E
Distr.
LIMITED
E/CN.14/CTNC/2
28 January 1977
Original: ENGLISH

UNITED NATIONS

ECONOMIC AND SOCIAL COUNCIL

ECONOMIC COMMISSION FOR AFRICA
CENTRE ON TRANSNATIONAL CORPORATIONS

African Regional Meeting on a Code of Conduct
for Transnational Corporations

Addis Ababa, 31 January - 4 February 1977

TRANSNATIONAL CORPORATIONS: ISSUES INVOLVED IN THE FORMULATION OF A CODE OF CONDUCT

TABLE OF CONTENTS

	Paragraphs	Page
INTRODUCTION	1 - 3	1
I. POSSIBLE SCOPE OF A CODE OF CONDUCT FOR TRANSNATIONAL CORPORATIONS	4 - 15	1
II. MAIN ISSUES AND POSSIBLE OPTIONS	16 - 67	4
A. GENERAL PRINCIPLES OF BEHAVIOUR OF TRANSNATIONAL CORPORATIONS	17 - 23	4
B. ISSUES RELATED TO POLICIES AND PRACTICES OF TRANSNATIONAL CORPORATIONS	24 - 67	6
III. PRINCIPLES OF GOVERNMENT POLICY AND ISSUES OF JURISDICTION	68 - 80	14
A. TREATMENT OF TRANSNATIONAL CORPORATIONS	70 - 74	14
B. ALLOCATION OF JURISDICTION	75 - 78	15
C. NATIONALIZATION AND COMPENSATION	79 - 80	15
IV. NATURE AND MACHINERY	81 - 102	16
A. LEGAL NATURE	81 - 90	16
B. FORMULATION AND LANGUAGE OF THE PROVISIONS	91 - 95	17
C. MACHINERY FOR IMPLEMENTATION	96 - 100	18
D. DISPUTE SETTLEMENT	101	19
E. POSSIBLE STRUCTURAL ALTERNATIVES	102	20
SUMMARY		21
ANNEX : PROPOSALS AND VIEWS ON A CODE OF CONDUCT		

INTRODUCTION

1. The Commission on Transnational Corporations, at its second session, held in March 1976, established an intergovernmental working group of the whole to prepare an annotated outline of a TNC code of conduct for submission to the Commission at its third session (25 April - 6 May 1977). 1/ The working group is to meet in New York from 10 to 14 January 1977 and again from 22 February to 4 March for this purpose.

2. To assist in the group's work, the United Nations Centre on Transnational Corporations prepared the following reports: "Transnational corporations: issues involved in the formulation of a code of conduct" (E/C.10/17) and "Transnational corporations: material relevant to the formulation of a code of conduct" (E/C.10/18).

3. At its second session the Commission further envisaged regional meetings of developing countries to co-ordinate their views on the subject. 2/ The Meeting for which the present paper has been prepared has been organized for this purpose. This paper draws on and summarizes the above-mentioned documents, with a view to providing a basis for discussion to assist the participants at the Meeting.

I. POSSIBLE SCOPE OF A CODE OF CONDUCT FOR TRANSNATIONAL CORPORATIONS

4. In the preparation of a code of conduct, several interrelated aspects need to be considered: purpose, coverage, comprehensiveness, legal nature and methods of implementation.

5. The purpose of any code is to regulate behaviour so as to lead to a desired result. The purpose of a TNC code of conduct is to ensure that TNC activities are consonant with host country objectives, encouraging activities beneficial to this end and discouraging those with negative effects. One way of achieving this objective is to improve the bargaining position of developing countries vis-à-vis transnational corporations. Thus, a code could limit the extent to which transnational corporations benefit from some of the advantages inherent in their structure and nature by characterizing certain behaviour and practices as illegal, unusual or inappropriate.

6. The fundamental goals of development and equity could be enhanced by a code with some of the following objectives, which are not mutually exclusive. One objective could be to obtain agreement - explicit or tacit - among the Governments adopting the code whereby the rules concerning transnational corporations established

1/ "Commission on Transnational Corporations: report on the second session" (E/5782), paras. 10 and 13.

2/ Ibid., para. 12

within certain broad limits by each Government would be accepted by the rest. Thus, actions by Governments within those limits could not be objected to by other Governments. Another objective could be to supplement national rules by a set of international rules which national Governments might for one reason or another be unable to introduce into their domestic legislation. Still another could be to seek to some extent to harmonize national laws. Such harmonization would reduce the ability of transnational corporations to take advantage of differences between national regulations to optimize their global activities. Finally, a code could help Governments to formulate specific policies and laws on transnational corporations by providing internationally acceptable models and suggesting patterns of legislation.

7. Coverage of TNC activities as a feature of the code is generally agreed upon; some countries, however, feel that the code should also cover Government policies towards TNCs. None of these positions, however, suggests that a question arises of formal reciprocity between Governments and transnational corporations. There can be no dispute over the fact that these entities are qualitiatively different participants in international relations. Transnational corporations are corporations operating in several countries through the permission and under the laws of each country concerned. States, on the other hand, are sovereign entities, full subjects and makers of international law.

8. The drafters of a code or provision of a code covering the behaviour of transnational corporations should bear in mind that there are many different types of enterprise that can be called transnational. They can be distinguished according to the sectors within which they operate, or according to their objectives (and impacts). Possible sectors may include extraction, agriculture (agri-business), finance, manufacturing and services (shipping, insurance, commercial, tourism, consultation, etc.). Some corporations seek essentially for markets, others for resources, still others for efficiency (least-cost production). Each has a quite different orientation, and it might not be possible sometimes to treat them effectively by the same provisions.

9. As to a definition of TNC, it is not necessary that a code of conduct should start with a formal and comprehensive definition of transnational corporations. The Commission's conclusions on the matter could eventually offer an authoritative definition even after the adoption of a code.

10. Comprehensiveness can refer to geography and to substance. The proposed code could be universal in application; on the other hand, it could cover, or provisions of it could cover, only TNCs operating in developing countries, or it could even exclude a particular geographical region. This issue was not raised in the Commission's discussions. It is assumed, therefore, that the Commission's intent is to formulate a code which would cover TNC activities in both home and host countries and in developed and developing countries alike.

11. The effectiveness of a code of conduct on transnational corporations will depend on three major factors: the formal legal character of the instrument in which it is embodied, the precise language of its provisions and the machinery for its implementation. As far as each of these is concerned, there are several choices to be made, a whole series of interrelated specific decisions with each decision on any particular facet affecting the others. The final outcome will depend on the interaction of all these choices. On a more general level, the code's effectiveness will depend on the intentions of the States adopting it, and the extent to which they commit themselves, in their national and international legal activities, to the principles and rules to be embodied in it.

12. International law has at its disposal a wide variety of instruments which can be used to express the consensus of States with varying degrees of authority, specificity, and binding force. The choice among them must be dictated by considerations of expediency (what is feasible, in view of current attitudes and positions of the Governments and other factors concerned) and by judgements linked to the purposes and provisions of the proposed instrument. For present purposes, three categories of possible legal instruments may be listed. An instrument from any of these categories (or a combination of instruments) could incorporate a code of conduct concerning TNCs. There are several possible sub-categories and combinations within these three broad classes.

(a) An international multilateral convention, signed and ratified by sovereign States;

(b) A declaration of principles (and rules), adopted at an international conference by participating sovereign States;

(c) A resolution of an organ of an international organization (United Nations General Assembly, Economic and Social Council).

13. Of the three types of instruments listed, only the first, an international convention, has formal binding force. An instrument called a declaration, signed and promulgated by States, may have formal binding force if the signers so intend (that is to say, an international treaty may bear the title of "Declaration"). Another possibility is to have an instrument which is not a formal international agreement, but which expresses in solemn manner the common intent of States. Resolutions are usually recommendations to governments; they can also express the intent of Governments to act in a certain way or to require certain action from their subjects.

14. The actual effectiveness of any legal instrument depends in part on the language chosen for its provisions. A formally binding instrument may be of limited effect if its provisions are so formulated as to allow a very large margin of discretion to those to whom it is addressed. On the other hand, the actual impact of the provisions of a not formally binding instrument may be enhanced if they are precise and specific and allow little leeway for differing interpretations.

15. As far as implementation is concerned, possible non-compliance could be dealt with internationally or at the national level. The code could contain provision for an international institution to keep the field of application of the code, and its implementation, under continuous review. The institution could have a political as well as a research and study component, with a view to possible international action either to amend the code or to deal with non-compliance. Much reliance will have to be placed on national action, and particular attention will have to be given to this point in drafting both the substantive and procedural provisions of the code. In a code, or provisions of a code, relating to governmental policies, appropriate machinery will also need to be provided for the settlement of related disputes.

II. MAIN ISSUES AND POSSIBLE OPTIONS

16. In preparing their views and proposals on a code of conduct, participants may wish to consider possible options on each of the main issues that a code could cover. The remainder of this paper is devoted to that purpose.

A. GENERAL PRINCIPLES OF BEHAVIOUR OF TRANSNATIONAL CORPORATIONS

17. General principles are those which transcend the overall relationship between Governments and transnational corporations, such as their obligations to observe local laws and to adhere to the economic and social objectives of the countries in which they operate.

1. Observance of local laws

18. The obligation to observe local laws can be expressed as a declaratory statement to that effect or in terms of the sovereign right of States to enact and enforce laws, as in the Charter of Economic Rights and Duties of States 3/ and the OECD guidelines. 4/

2. Adherence to economic goals and development objectives

19. The need for transnational corporations to contribute positively to development in conformity with the goals and objectives of the country in which they operate is referred to in all the international documents dealing with foreign investment in developing countries, including the Action Programme adopted at the Fourth Non-aligned Conference, 5/ the Economic Declation of the Fifth Summit Conference of Non-aligned Countries, 6/ a paper submitted to the Commission by a number of Latin American Countries, 7/ the Programme of Action submitted by the Group of 77 to the ILO World Employment Conference, 8/ the Lomé Convention, 9/ the Andean Investment

---

3/ General Assembly resolution 3281 (XXIX).

4/ "Declaration on International Investment and Multinational Enterprises", OECD Press Release A(76)20 of 21 June 1976, annex. Referred to below as "OECD guidelines".

5/ "Action Programme for Economic Co-operation of the Fourth Conference of Heads of State or Government of Non-aligned Countries", in Non-aligned Conferences: Basic documents, 1961-1975 (Colombo, Bandaranaike Centre for International Studies, 1976), p.108. Referred to below as the "Action Programme of the Fourth Non-aligned Conference".

6/ Economic Declaration of the Fifth Summit Conference of Non-aligned Countries, (1976), (5)(b), p.12.

7/ E/5782, Annex IV.

8/ Declaration of Principles and Programme of Action adopted by the Tripartite World Conference on Employment, Income Distribution and Social Progress and the International Division of Labour (ILO document WEC/CN/E.1), para. 85(iv). Referred to below as "the ILO Programme of Action".

9/ ACP-EEC Convention of Lomé (Brussels, Secretariat-General, Council of the European Communities,

Code (Decision 24) 10/ and the guidelines drawn up by the International Chamber of Commerce. 11/

20. In the "Revised framework of principles for the implementation of the new international economic order in Africa, 1976-1980-1986", which it recently adopted, the ECA Executive Committee specifically points out that "if a policy of fostering self-reliance is realistically interpreted, it is not inconsistent with foreign financing playing a substantial role in the development process, either directly or indirectly. What is essential is for foreign funds to flow inwards and for them to be identified with imports of goods and services not available within the domestic economy directed to high priority projects." 12/

21. It is generally agreed that the needs of the least developed countries demand special consideration; this has so far not been incorporated in documents dealing specifically with transnational corporations, but is frequently referred to in texts dealing with overall development objectives and more particularly with industry, as, for example, the UNIDO Lima Declaration. 13/ In view of the fact that the vast majority of least developed countries are to be found in the African region, African delegations would doubtless be well advised to ensure that this principle is appropriately dealt with in the code of conduct, and that specific provisions to implement the principle are included therein.

3. Adherence to socio-cultural objectives and values

22. The need for TNCs to adhere to the socio-cultural objectives and values of the host countries is a principle that has met with broad acceptance. 14/

4. Respect for human rights and fundamental freedoms

23. A number of recent international documents relating to international co-operation and to foreign investment have emphasized the need for respect for human rights and fundamental freedoms. An example is the Charter of Economic Rights and Duties of States. The Group of Eminent Persons set up under Economic and Social Council resolution 1721(LIII) recommended that:

10/ Commission of the Cartagena Agreement, Common Régime of Treatment of Foreign Capital and of Trademarks, Patents, Licences and Royalties (Cartagena, 1969), para. 2.

11/ Guidelines for International Investment (Paris, International Chamber of Commerce, 1972). Referred to below as the "ICC guidelines".

12/ E/CN.14/ECO/90/Rev.3, para. 121.

13/ "Lima Declaration and Plan of Action on Industrial Development and Co-operation". (ID/B/155/Add.1).

14/ See, for example, the Latin American paper (E/5782, Annex IV).

> "home and host countries should ensure ... that multinational corporations do not violate sanctions imposed by the United Nations Security Council, for example, on countries suppressing human rights and following racist policies." 15/

B. ISSUES RELATED TO POLICIES AND PRACTICES OF TRANSNATIONAL CORPORATIONS

1. Political issues

(a) Interference in national political affairs

24. The principle of prohibition of political intervention in domestic affairs of States is beyond dispute.

25. The basic rule, deriving from the universally accepted principles of non-intereference, is formulated, for example, in the Charter of Economic Rights and Duties of States: "transnational corporations shall not interefere in the internal affairs of a host state." 16/ A similar formulation is contained in the guidelines submitted by the Latin American group. 17/ The OECD guidelines call upon enterprises to "abstain from any improper involvement in local political activities". 18/ The Group of Eminent Persons introduced a concept of "permissible public activities" and recommended that:

> "host countries should clearly define the permissible public activities of the affiliates of multinational corporations and also prescribe sanctions against infringements." 19/

(b) Interference in intergovernmental relations

26. Since transnational corporations are involved in economic transactions between States, it has been felt that norms should be established to prevent the corporations from interfering in the relations among governments and from being used as instruments for the conduct of foreign relations of countries. The Group of Eminent Persons, the Programme of Action of the ILO World Conference, the Group of 77 and the Latin American Group in its submission to the Commission stressed this point.

2. Corrupt practices, particularly illicit payments

27. The Economic and Social Council in resolution 2041(LXI) established an Ad Hoc Intergovernmental Working Group to conduct an examination of the problem of corrupt practices and to elaborate in detail the scope and content of an international agreement on this subject. The code of conduct could embody general norms on this issue or incorporate the outcome of the Group's work.

15/ The Impact of Multinational Corporations on Development and on International Relations (United Nations publication, Sales No. 74.II.A.5), p.50.

16/ General Assembly resolution 3281(XXIX), chapter II, article 2(2)(b).

17/ E/5782, Annex IV, Section B.

18/ OECD guidelines, para.9.

19/ The Impact of Multinational Corporations ..., op. cit., p. 46.

3. Economic and commercial issues

(a) Ownership and control

28. The issue of ownership and control by TNCs of sectors of the economy of host countries has been a matter of concern in recent years, as ownership is associated with control over a country's resources.

(i) Permanent sovereignty

29. The Charter of Economic Rights and Duties States: "Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities." 20/ A similar view is expressed in the Declaration on the Establishment of a New International Economic order. 21/

(ii) Terms of admission and operations

30. It is recognized 22/ that every State has the right to control the inflow of foreign investment and to regulate the establishment of foreign enterprises in its territory. For example, foreign corporations are usually prohibited from entering the defence, trasport and communication sectors. Also, certain sectors are sometimes restricted in order to protect existing domestic enterprise and in some countries, sectors considered to be of national interest are reserved to public ownership. The Group of Eminent Persons urged that:

> "host countries should clearly define and announce the areas in which they are ready to accept foreign investment, and also the conditions." 23/

(iii) Forms of ownership and phased changes in ownership

31. Foreign ownership can be restricted in various degrees by national legislation. For example:

(a) All firms incorporated in Gabon are subject to a 10 per cent State participation rule; 24/

(b) Under the Nigerian Enterprises Promotion Decree of 1972, better known as the Indigenization Decree, enterprises were classified into two schedules. Enterprises where the Government felt that Nigerians had the necessary competence were included in Schedule I and were exclusively reserved for Nigerians, while others of a more involved technical nature had to have 40 per cent indigenous ownership and were placed in Schedule II. Only enterprises involving activities of a very high technical nature could be operated by foreigners without indigenous equity participation.

20/ General Assembly resolution 3281(XXIX), chapter II, article 2(1).

21/ General Assembly resolution 3201(S-VI), para. 4(e).

22/ In, for example, the Action Programme of the Fourth Non-aligned Conference, the Andean Investment Code (Decision 24) and the OECD guidelines.

23/ The Impact of Multinational Corporations ..., op. cit., p.59.

24/ Ordinance No. 41 of 10 June 1972.

(c) The Andean Foreign Investment Code provides for the progressive transfer of the ownership of existing foreign enterprises to nationals of the country in which they are located;

(d) The Pacific Basin Charter on International Investment recommends that ample opportunities should be available to national investors to participate through joint ventures or otherwise in ownership and management of international enterprises operating in their countries. 25/

(b) Balance of payments and financing

32. In view of the overwhelming balance-of-payments problems of the great majority of developing countries, consideration of the transnational corporations' obligation to alleviate balance-of-payments problems is of particular relevance. This is stressed by, among many others, the Latin American Group, 26/ and the Fourth Non-Aligned Conference, which stated that "care should be taken to ensure that foreign investment ... represents a net saving in foreign exchange". 27/

33. A strictly declaratory statement may not always appear to be satisfactory because the effects of the economic activity of a corporation on the balance-of-payments issue depend on the nature of the activity itself. Balance-of-payments problems should be seen in a larger context including issues of imports and exports of transnational corporations, local processing of raw materials and the ensuing value added to exports, the pricing of financial services, under-invoicing of exports and over-invoicing of imports, technology transfer, adaptation and development, remittance of profits, repatriation of capital and reinvestment of profits.

34. An important issue affecting the balance-of-payments of a host country is local and foreign borrowing and debt financing by TNCs. To cope with this problem, the Andean Foreign Investment Code (Decision 24) regulates both foreign and domestic borrowing by TNCs. 28/

35. To improve the balance-of-payments situation of host countries, the Group of 77 laid down in the Action Programme of the World Employment Conference that action should be taken by the developing countries, at various levels, to ensure that transnational corporations increase local processing and contribute to the diversification and expansion of exports. 29/

(c) Transfer of pricing

36. Prices charged in transnations within corporations and fees for management or use of industrial property can be used as a means of reducing the tax assessment basis and of moving profits to countries with a more favourable tax system.

25/ Pacific Basin Economic Council, The Pacific Basin Charter on International Investments: a Declaration of Basic Principles (Merlo Park, California, PBECUS National Committee, 1972).

26/ Aide-mémoire submitted by the Latin American Group to the OAS Third Preparatory Meeting of the Working Group on Transnational Enterprises of the Meeting of Foreign Ministers (document 4), p.7, guideline G.

27/ Action Programme of the Fourth Non-aligned Conference, p.108.

28/ Articles 14 and 17.

29/ ILO document WEC/CN/E.1, para.86.

37. Together with OECD and ICC in their guidelines, and the Latin American group in its submission to the Commission, the Group of Eminent Persons stressed that:

> "home and host countries should enforce 'arm's length' pricing wherever appropriate". 30/

38. It is also emphasized in the "Revised framework of principles for the implementation of the new international economic order in Africa, 1976-1981-1986" that "close attention ... needs to be paid to inter-company transactions associated with transnationals." 31/

(d) Taxation

39. The fact that transnational corporations undertake economic activities which fall urder tax systems and jurisdictions of several countries raises a number of problems that call for international co-ordination and agreement.

40. In general, the questions raised in the context of taxation of the transnational corporations refer to the scope of national taxation, particularly the extent of tax jurisdiction over foreign-source income and on the other hand unilateral tax relief; to the problem of bilateral taxation agreements; and to international efforts to harmonize tax treaties.

41. The most essential requirement for devising an equitable tax assessment scheme is full and complete knowledge of the financial transactions undertaken.

42. Both the list of areas of concern presented by the group of Latin American countries and the OECD guidelines stress the need to harmonize national tax legislations. A further issue of particular concern for developing countries is the use of taxation as a tool for stimulating international investment: without any regional co-ordination and without the benefit of a bilateral treaty with the home country of the foreign investor, such competition may run against the interests of host countries, leading them to give away more than necessary, with the added possibility that the incentive may be ineffective if home country legislation taxes TNCs' foreign income not taxed by host governments.

(e) Competition and restrictive business practices

43. Transnational corporations can, because of their global nature and control over market and distribution facilities, exercise considerable influence over key sectors of international trade on which the host country's economy depends, and affect the competitive structure of the world market.

30/ The Impact of Multinational Corporations ..., op.cit., p.89.

31/ E/CN.14/ECO/90/Rev.3, para. 119.

44. The Group of Eminent Persons underscored the need for entering into international agreements on this question, and recommended that "international recognition" should be given to "the principle that restrictive clauses and market allocation by multinational corporations should be eliminated within regional groups of countries". 32/

45. UNCTAD has been concerned with the question of restrictive business practices. UNCTAD resolution 96(IV) called for:

> "formulating a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices having adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries".

The OECD guidelines also include measures to prevent abuses by TNCs in this area.

46. The obligation of TNCs to provide information which is necessary to permit Governments to deal with this issue is referred to in the proposals of the Group of Eminent Persons, UNCTAD, the ICFTU Charter, the Organization of American States, the ICC and OECD guidelines and the paper submitted by the Latin American countries.

(f) Transfer of technology

47. A code of conduct for the transfer of technology is being prepared under the auspices of UNCTAD. In resolution 89(IV) the Conference recommended that the General Assembly should "convene a United Nations conference under the auspices of UNCTAD, to be held by the end of 1977, and that the said conference should negotiate on a draft code of conduct to be elaborated" by an intergovernmental group of experts at meetings in 1976 and 1977, "as well as take all decisions necessary for the adoption of the final document embodying the code of conduct for the transfer of technology, including the decision on its legal character". Two separate draft outlines of the code have already been prepared, one by the Group of 77, and the other by Group B (developed market economy) countries. Major differences exist between the two drafts. For example, Group B favours a set of guidelines which are voluntary, whereas the Group of 77 prefers a code which is legally binding in character.

48. As concerns the nature and scope of the dispute settlement machinery, the Group B countries envisage free recourse to arbitration; the Group of 77 recognizes the possibility of recourse to arbitration, but insist that as a basic rule, technology transfer agreements must be governed by the laws of the country receiving the technology.

49. In terms of substance, the developing countries advocate favourable terms for technology transfer commensurate with their development needs. Group B, on the other hand, proposes that in order to promote development, facilitate exchanges of information, promote the availability of developmental assistance and facilitate greater access to technology in the framework of international co-operation, enterprises supplying technology should be exhorted to be responsive to the needs of developing countries and to refrain from indulging in certain restrictive practices, such as anti-competitive practices relating to the use of patents, trademarks, licenses and so on.

50. In this connexion it is also noteworthy that UNCTAD, in resolution 87(IV), welcomed the decisions taken by the Conferences of African Ministers of Trade, Industry and Education to establish an African centre for the development and transfer of technology and requested OAU and ECA, in co-operation with a number of other organizations, "to convene a meeting of plenipotentiaries in 1977, preceded by appropriate preparatory work, to establish the centre".

51. The Lomé Convention contains a provision by which the Community pledged to assist the ACP States to overcome obstacles in the "access to and adaptation of technology". The Community also agreed to: keep the ACP States better informed on technological matters and assist them in selecting technology; facilitate their contacts and relations with firms; facilitate the acquisition, on favourable terms and conditions, of patents and other industrial property; and contribute to the establishment and expansion of industrial research facilities in the ACP States with particular reference to the adaptation of available technology to the conditions and needs of those States. 33/

52. The OECD guidelines call on enterprises to contribute to the development of national technological capacities in the host countries, to allow rapid diffusion of technologies and to supply technology on reasonable terms and conditions. 34/

53. The report of the Group of Eminent Persons stresses the need for national technology-screening-machinery, an example of which may be found in the Andean regulations. 35/

(g) Employment and labour

54. Most international instruments concerned with the conduct of transnational corporations deal with the issues of employment and labour. The issues covered can be grouped into five major areas of specific concern:

(a) Information required by trade unions and host Governments that concern employment;

(b) The role and rights of trade unions as representatives of the workers;

(c) Protection of the labour force: labour standards, questions of non-discrimination, the rights of workers in case of take-overs and closures of enterprises;

(d) Employment, in its quantitative and qualitative dimension;

(e) All aspects of labour and employment policies that are specific to the situation of developing countries, and all efforts undertaken with a view to achieving a new international division of labour.

33/ Article 31.

34/ Section on "Science and Technology", articles 1-3.

35/ The Impact of Multinational Corporations ..., op.cit., pp. 66-73.

(i) Information

55. The ICFTU Charter, the OECD guidelines and the ILO Programme of Action stress the necessity for TNCs to provide representatives of employees with information necessary for meaningful negotiations on conditions of employment.

56. The Group of Eminent Persons emphasized in addition the need to permit free entry to trade unionists from other countries representing international or national organizations.

(ii) Industrial relations, including consultation and participation in decision-making

57. The OECD guidelines underline the right of workers to be represented by trade unions. The World Federation of Trade Unions (WFTU), 36/ the ICFTU Charter and the Group of Eminent Persons, in addition, recognize the right of the trade unions to participate in decision-making in the big multinational companies.

(iii) Protection of rights of employees and conditions of employment

58. The ICC guidelines recommend that TNCs should provide "the best possible wages, social benefits, retirement provisions and working conditions within the framework of the Government's policies". 37/ The OECD guidelines exhort TNCs to "observe standards not less favourable than those observed by comparable employers in the host country". 38/ The Group of Eminent Persons calls upon TNCs "to declare in all countries in which they operate, all measures of safeguards and special working conditions which they observe in their home countries to protect the health and safety of workers". 39/ The ILO Programme of Action emphasizes that "existing Conventions of the ILO ought to be applied". 40/ The ICFTU Charter suggests a number of measures requiring the co-operation of the trade unions of the host and other countries.

59. The report of the Group of Eminent Persons also emphasizes the need to protect workers' interests by compensation by both the home and the host country in cases of closure of enterprises.

(iv) Employment

60. The Group of Eminent Persons urged home countries not to hamper the process of transfer by multinational corporations of the production of labour-intensive and low-skill products to developing countries; and pointed out the need to ensure that transnational corporations train and promote local workers and local management personnel. This latter point is also emphasized in the paper presented by the Latin American Group.

36/ The Worsening of the Crisis of the Capitalist World, (1975, p.13).
37/ Section VI.1.f.
38/ Article 7.
39/ The Impact of Multinational Corporations ...., op.cit., p.80.
40/ Para. 110(ii).

(h) Consumer protection

61. The Group of Eminent Persons recommends that "home countries should publicize prohibitions and restrictions on products, or ingredients of products", and that "host countries should require the affiliates of multinational corporations to reveal to them any sales prohibitions and restrictions in manufacturing imposed by home or by other host countries". 41/

(i) Environmental protection

62. The Charter of Economic Rights and Duties of States and the Action Programme of the Fourth Non-aligned Conference state that the fulfilment of the basic development requirements of developing countries should not be hampered by heavy expenditure they may have to bear for environmental protection.

(j) Information

63. The inadequacy of the available data and information represents a matter of serious concern to Governments, unions and the general public.

64. Information on transnational corporations and the transparency of their activities has a national and an international dimension, because their operations and decision-making in one country may have relevance for another.

65. The OECD guidelines recommend that information should be made available regularly (at least annually) for a number of financial and non-financial items. The ICFTU Charter states that:

> "what is needed is legislation obliging multinational concerns to provide detailed financial accounts and other data not only for the branch in any particular country but also for the parent compnay." 42/

66. Several other instruments also stress the importance of information (e.g. the ILO Programme of Action; the paper submitted by the Latin American Group; the report of the Group of Eminent Persons).

67. Many of the questions central to information disclosure are currently being discussed by a Group of Experts on International Standards of Accounting and Reporting convened by the Centre on Transnational Corporations. The Group is to recommend a list of minimum items, together with their definitions, that should be included in reports by transnational corporations and their affiliates.

...

41/ The Impact of Multinational Corporations ..., op. cit., pp. 81-82.
42/ Para. 20.

III. PRINCIPLES OF GOVERNMENT POLICY AND ISSUES OF JURISDICTION

68. A code of conduct, even if it deals only with the behaviour of transnational corporations, would directly or indirectly affect government policies or actions.

69. States implicitly accept the necessity of creating in their territory conditions conducive to desirable behaviour by the TNCs, at the same time, States would also appear to recognize the authority of other Governments to create such conditions in their territory. Nevertheless, a code could spell out principles regarding Government policies on transnational corporations.

A. TREATMENT OF TRANSNATIONAL CORPORATIONS

70. Different criteria have been advanced on this issue. According to one approach, the treatment of TNCs should be comparable to the treatment of a national enterprise within the same country. In another approach, the standards applied tend to place one or the other in a preferential position.

71. A further criterion is that enterprises in developing countries should conform to their development needs.

72. The Charter of Economic Rights and Duties of States lays down that each State has the right to regulate TNCs in accordance with its laws and regulations and in conformity with its national objectives and priorities, and that no State should be compelled to grant preferential treatment to foreign investment. The principle of non-preferential treatment is also set out in the Andean Foreign Investment Code.

73. The OECD guidelines stress that regulations should not aim at introducing differences of treatment between multinational and domestic enterprises, that member countries should treat enterprises equitably and in accordance with international law, and that member countries should accord to enterprises treatment under their laws, regulations and administrative practices consistent with international law and no less favourable than that accorded in like situations to domestic enterprises. Consultations are foreseen in cases where a member country of OECD adversely affects through incentives or disincentives the flow of international direct investment of another member country. The Group of Eminent Persons provided for certain exceptions to the principle of equal treatment to safeguard the national interest.

74. The ICC guidelines state that the Government of the host country "should not discriminate on the grounds of ... foreign ownership ..., it being understood that the Government has the right to accord special treatment to any enterprise or enterprises, whether domestic or foreign-owned, in the interest of the national economy". 43/ The Declaration on the Establishment of a New International Economic Order calls for "preferential and non-reciprocal treatment for developing countries, wherever feasible."44/

43/ Section I.3.d.

44/ General Assembly resolution 3201(S-VI), para. 4(n).

B. ALLOCATION OF JURISDICTION

75. Although the transnational corporations are creatures of national law, and hence are exclusively subject to the national jurisdiction of the State in which they are incorporated, the impact of their activity often transcends national boundaries. Consequently, other States' jurisdictions also come into the picture, and the issue of the "extraterritorial application of laws" arises.

76. An important issue for consideration here will be how far the host country can protect and enforce its sovereignty, when the conduct of a transnational corporation doing business within its jurisdiction violates its laws but not the laws of the home country of the corporation, or vice versa. A number of procedural measures have been recommended for adoption through international treaties or conventions to deal with extraterritoriality. The Group of Eminent Persons recommended that "countries should refrain from extra-territorial application of their domestic legislation, unless it is exercised under bilateral or, preferably, multilateral agreements"; and that "countries should explore ..."the possibility of concluding an international agreement regulating the issue of extraterritoriality of jurisdiction. As an interim measure, formal consultative machinery should be established in cases of conflicts of jurisdiction". 45/ The OECD guidelines state that "every State has the right to prescribe the conditions under which multinational enterprises operate within its national jurisiction, subject to international law and to ... international agreements". 46/

77. Texts prepared by the developing countries treat the competence to legislate and the jurisdiction of the courts in an inseparable manner. For example, the papers prepared by the Latin American Group, the Andean Foreign Investment Code and the ILO Programme of Action state that transnational corporations are subject to the laws of the receiving country and, in case of litigation, should be subject to the exclusive jurisdiction of the courts of the country in which they operate.

78. On the question of the procedures for compulsory settlement of disputes, practice shows sharp contrasts in approach. In some instruments arbitration and conciliation have been agreed to. However, the Charter of Economic Rights and Duties of States declares that any controversy "shall be settled under domestic law ... unless it is freely and mutually agreed by all States concerned that other peaceful means be sought." 47/

C. NATIONALIZATION AND COMPENSATION

79. The principle of the sovereign right of a State to nationalize enterprises in the public interest is generally recognized. However, the conditions of nationalization, and in particular the final authority to determine questions of jurisdiction and compensation, have remained controversial issues.

80. The Charter of Economic Rights and Duties of States and the General Assembly resolution on permanent sovereignty over natural resources 48/ declare that the jurisdiction of the nationalizing State governs the matter, unless arbitration or other settlement procedures are mutually agreed upon by both parties. The OECD guidelines encourage international arbitration as a procedure for settlement of disputes.

45/ The Impact of Multinational Corporations ..., op.cit., p.50.
46/ Para. 7.
47/ General Assembly resolution 3281(XXIX), Chap.II, article 2(2)(c).
48/ General Assembly resolution 1803(XVII), Section I. para.4.

III. NATURE AND MACHINERY

A. LEGAL NATURE

81. A code of conduct might take the form of a multilateral convention, a declaration or a resolution.

(a) Multilateral conventions

82. It is possible to envisage basically two types of multilateral convention. First, a multilateral convention in which States parties to it would undertake to give effect to its provisions in their domestic law, in order to implement the convention. The precise manner in which the provisions of the convention are to be incorporated in each country's law would be left to each Government to decide. An illustration of this type of instrument is the Convention on a Code of Conduct for Liner Conferences, concluded in 1974 under the auspices of UNCTAD (see TD/CODE/11/Rev.1, and annex I).

83. A second type would be a multilateral convention which may stipulate that the contracting parties incorporate its provisions in their domestic law. In this way, the legislative measures eventually enacted by each member State in carrying out its obligations under the convention would be virtually identical, save for variations the convention itself allows.

84. An example of this type is the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods. 49/

85. A related possibility could be the inclusion in a convention of a "model law" which would place at the disposal of States a ready model which could, if States so wish, be incorporated totally or partially in their legislation.

86. A possible variant is to combine two types of international instrument: first, a general multilateral convention formulating certain basic principles, and secondly, within the framework established by it, a network of bilateral or regional agreements that might be concluded, containing specific provisions. Such an approach would allow variations on a regional or other basis.

(b) Declarations

87. A declaration (under whatever name) can be issued by Governments, usually at the end of a diplomatic conference. Such a declaration does not have the legal status of an international agreement, yet the procedures followed lend the instruments a certain authority and create expectations concerning the participants' adherence to its principles. A recent illustration is the Final Act of the Helsinki Conference. 50/

88. In the Declaration on International Investment and Multinational Enterprises, adopted by the Council of the Organization for Economic Co-operation and Development on 21 June 1976, a mixed approach was used, which provides a noteworthy variant. The Declaration refers to four distinct instruments. One is the "Guidelines for multinational enterprises", and the other three are separate decisions of the Council referring to Governments and dealing with action by Governments. The Guidelines are expressly of a voluntary character. The Council decisions, on the other hand, are binding on the States.

49/ Register of Texts of Conventions and other Instruments Concerning International Trade Law, Volume I (United Nations publication, Sales No. E.71.V.3), pp.39-63.
50/ Conference on Security and Co-operation in Europe, Final Act (Helsinki, 1975).

(c) Resolutions

89. A resolution or recommendation can be adopted by an organ of an international organization, for example, the General Assembly of the United Nations. While such resolutions do not have the formal binding force of an international agreement, they may in fact be taken by States to have an effect similar to that of a formally binding instrument. Their precise legal effect will depend on the particular circumstances of each case, including the degree of general agreement, the import of related statements of government representatives, and so on.

90. In the opinion of the United Nations Office of Legal Affairs, a declaration is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated, such as the Declaration on Human Rights. A recommendation is less formal. 51/

B. FORMULATION AND LANGUAGE OF PROVISIONS

(a) Specificity of language

91. Mandatory provisions are either prescriptive or prohibitive, and non-mandatory provisions are either optional or recommendatory in nature.

(b) Prescriptions and prohibitions

92. The provisions of a code of conduct may:

(i) Prescribe or prohibit in general terms in order to lay down the broad limits of appropriate behaviour on the part of transnational corporations;

(ii) Prescribe or prohibit in more specific terms a particular course of conduct;

(iii) Prescribe or prohibit in more specific terms certain desirable or undesirable outcomes.

(c) Qualifications of prohibitions

93. Prohibitions can be outright or qualified.

(d) Assertion of State authority and qualifications

94. To the extent that a code addresses, directly or indirectly, States, then its provisions may delimit the State's authority to act with respect to transnational corporations in several possible manners.

(i) A direct assertion of authority

Example:
Each State has the right .....

51/ E/CN.4/L.610.

(ii) An indirect assertion of authority, where the State's authority is expressed in terms of the transnational corporation's obligation

Example:

Enterprises should upon request of the taxation authorities .....

(iii) A direct or indirect assertion concerning the limits of a State's authority

Example:

The transnational corporations shall not serve ..... as a means of extending the juridical order of the country of origin.

95. The language of a code's provisions may vary with respect to the margin of freedom of choice and action it leaves to the States concerned.

C. MACHINERY FOR IMPLEMENTATION

96. The machinery for implementation will depend on the nature of the provisions included in a code. The provisions may be of a mandatory character or left to the voluntary action of the parties. Where mandatory provisions are envisaged, sanctions for non-compliance or violation of its provisions may become necessary; sanctions are effective when accompanied by a proper commitment to resort to them, wherever necessary.

(a) Mechanisms for implementation

97. The mechanisms for implementation may range from the establishment of permanent institutions entrusted with requisite competence to voluntary procedures; from machinery for periodic review of the instrument to machinery for dispute settlement and for sanctions for non-compliance; several combinations of approach are possible.

(b) Review and revision

98. Multilateral instruments often provide for specific mechanisms for their review and revision, such as a review conference at the end of certain stipulated periods of time, or an ad hoc conference convened at the request of certain number of States parties to the agreement.

(c) Machinery and functions

99. In ascending order of degree of involvement, the following different types of functions could be envisaged:

(i) Information and servicing functions

Example: the 1974 Convention on a Code of Conduct for Liner Conferences[52/].

52/ TD/CODE/11/Rev.1, annex I, article 46.

(ii) Review and appraisal of implementation

Example: the International Development Strategy for the Second United Nations Development Decade 53/.

(iii) Consultation and other assistance in resolving differences

Example: the OECD guidelines and the General Agreement on Tariffs and Trade 54/.

(iv) Fact-finding and reporting

Example: United Nations Human Rights Commission Ad Hoc Working Group of Experts to investigate various aspects of human rights in southern Africa.

(v) Inquiry and investigation

Example: through special commissions of inquiry the International Labour Organisation puts into motion procedures for enforcing the provisions of ILO conventions.

(vi) Settlement of disputes and sanctions

Example: the International Coffee Agreement of 1962 55/ and the General Agreement on Tariffs and Trade.

100. Implementation of the legal instrument by national authorities does not exclude the need for external supervision by international institutional organs. This may range from the relatively passive role of an agency responsible for receiving information concerning national action on implementation of the instrument to the active monitoring and investigation of pertinent national activity.

D. DISPUTE SETTLEMENT

101. A code of conduct may give rise to disputes with respect to either its interpretation or its application. The nature and character of the legal obligations provided in the instrument involved play a role in determining the exact method of dispute settlement to be used in each situation. A number of approaches can be used:

(i) Consultation

Example: the OECD guidelines.

(ii) Conciliation

Example: the ICAO Convention 56/.

53/ General Assembly resolution 2626(XXV), Section D.

54/ See the original text of the Agreement and procedures (GATT publication, Sales No. GATT/1952-3) and amendments and revisions.

55/ E/CONF.42/R.2, articles 61 and 69.

56/ Convention on International Civil Aviation (Chicago, 1944).

(iii) Arbitration

Example: The Lomé Convention[57].

(iv) Adjudication

(v) International tribunals

Example: if a code of conduct were a treaty, it would be possible for disputes relating to it to be submitted to the International Court of Justice for binding adjudication. A special international tribunal may also be established, as is the case of the Court of Justice of the European Communities, or the proposed Law of the Sea Tribunal [58].

(vi) National courts

E. POSSIBLE STRUCTURAL ALTERNATIVES

102. Three broad types can be envisaged. Firstly, a universal instrument containing general principles. Secondly, a universal instrument containing general principles and specific rules for their implementation. Thirdly, an intermediate type of code would be provided by a universal instrument containing general principles and provisions for their implementation through other international instruments. This third approach could be based on the view that, apart from a universal consensus on certain basic principles and the homogeneity of a few main issues, the general treatment of the problems concerning transnational corporations may have to vary according to the level of development of countries, the specific aspects of the transnational corporation behaviour that are in question and the different sectors of activity involved.

57/ Op. cit., article 81.

58/ See A/CONF.62/WP.9/Rev.1.

SUMMARY

The present paper reviews the basic points on which agreement must be reached in order to formulate a Code of Conduct for Transnational Corporations. It also presents a number of options which participants at the African Regional Meeting on a Code of Conduct may wish to consider in trying to arrive at co-ordinated positions on the various issues to be discussed within the framework of the series of meetings of the Intergovernmental Working Group on the TNC Code of Conduct to be held in 1977 and 1978.

ANNEX

PROPOSALS AND VIEWS ON A CODE OF CONDUCT

1. In response to a decision of the Commission on Transnational Corporations at its second session, Governments and non-governmental interests were invited to make known their views and proposals on a code of conduct.

Views of Governments

2. As of 22 December 1976, the following Governments had responded to a note verbale circulated by the Secretary-General on 19 August 1976: Argentina, Chile, Ecuador, Finland, German Democratic Republic, Germany (Federal Republic of), Jamaica, Japan, Netherlands, New Zealand, United Kingdom and United States. Summaries of the answers appear in document E/C.10/19; further answers will be summarized in an addendum.

3. The answers received show a wide range of opinion regarding many of the key questions that arise in the formulation of a code of conduct. As to the nature of the code, for example, they range from countries which favour voluntary guidelines to those in favour of binding regulations. Similarly, some encourage arbitration, while other favour exclusive jurisdiction of the courts of the host country; some believe that the code should be addressed exclusively to TNCs, while others think that it should also include provisions regarding Government policies. Most of the answers received concurred in the opinion that the main issues to be included in the code were those discussed in the report entitled "Transnational Corporations: issues involved in the formulation of a code of conduct" (E/C.10/17) and outlined in the present paper.

Views of non-governmental interests

4. In response to a letter circulated by the Executive Director of the Centre on Transnational Corporations dated 25 August 1976, 18 non-governmental organizations representing labour, business and other interest had offered their views by 22 December 1976.

5. The answers received vary considerably as to extent and degree of detail. Some make reference to position documents published by the organizations concerned. As in the answers from Governments, a wide range of opinions is expressed as to the nature of the proposed code and many of its features; however, all agree that an effective code is necessary to deal with the issues relating to the activities of TNCs.